

Nos. 15959, 15960

United States
Court of Appeals

for the Ninth Circuit

CHENG FU SHENG and LIN FU MEI,
Appellants,
vs.

BRUCE G. BARBER, District Director, Immigra-
tion and Naturalization Service, Appellee.

Transcript of Record

In Two Volumes

VOLUME II.

(Pages 33-49, inclusive)

Appeal from the United States District Court for the
Northern District of California,
Southern Division

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Appeal from the United States District Court for the
Northern District of California,
Southern Division

In the District Court of the United States, North-
ern District of California, Southern Division

No. 36,393

CHENG FU SHENG, Plaintiff,

vs.

BRUCE G. BARBER, Defendant.

No. 36,403

LIN FU MEI, Plaintiff,

vs.

BRUCE G. BARBER, Defendant.

REPORTER'S TRANSCRIPT

Thursday, January 16, 1958

Before: Hon. Edward P. Murphy, Judge.

Appearances: For the Plaintiffs: Arlin W. Hargreaves, Esq. For the Defendant: Hon. Lloyd H. Burke, United States Attorney, by James W. Grant, Esq., Assistant U. S. Attorney. [1]*

Mr. Grant: Your Honor, in our proposed findings of fact which we have lodged it was our object to include what we believe you intended. We believe you intended to dispose of the issues which were raised in the petition, and to make findings which were in accordance with the conclusion that relief was denied, and therefore the petitioners' statements were to be refuted.

* Page numbers appearing a top of page of Reporter's Transcript of Record.

We feel that there are two pertinent findings in here that have been objected to — or one that has been objected to. But the entire point of the petitioner would be that, I believe, the Wei case has only the conclusion that the petitioner was deportable. We feel that if the Wei case is applicable to this situation we must go one step further and find that since he was deportable, since his status had changed between the time that he had arrived lawfully and the time that he made his petition, then he is no longer eligible for consideration under Section 6.

The Court: Referring to the Refugee Act, Section 6?

Mr. Grant: Yes, sir, the Refugee Relief Act.

The Court: For your benefit, Mr. Hargreaves, so when your turn comes to argue your position, I intended by the blanket order which I issued to cover that, because I said in the order I found upon review of all the administrative proceedings which had been held, if they may be called such, [2] before the Immigration and Naturalization Service, that there was no evidence, in my opinion, that the Board had acted either capriciously or arbitrarily, and I intended by that language to cover the Refugee Act. I saw no reason to particularize it.

The Board of Immigration Appeals found that these petitioners were entitled to no relief under the Refugee Act, Section 6, and I upheld that by, in effect, stating that I found no evidence that there had been any unwarranted abuse of the power and

the discretion or misuse of the evidence, and therefore I upheld the Immigration Service in that respect. And I think these findings make that obvious, and I think that was your purpose.

Mr. Grant: That was our purpose, to cover all the possible discrepancies between the findings that he was afforded due process and the allegations of the petition that he had not been. That is, very precisely, your Honor, our position.

The Court: I will hear from you, Mr. Hargreaves.

Mr. Hargreaves: It is our position, your Honor, as Mr. Grant has stated, that from your Honor's opinion we feel that the only way the Court could properly uphold—I do not want to say “uphold”—but not be inconsistent with the opinion filed, would be to adopt the government's finding that because the parties are deportable—I mean, there is [3] no question about that. We concede that they are deportable. It was never even contested before the Immigration Service. Because they are deportable, then, they are not eligible for relief under Section 6 of the Refugee Relief Act. Actually, that is the only finding in the Wei case, was that he was deportable.

I must admit that I was very surprised in reading the Wei case, because it was my understanding that it had been brought on the question of physical persecution in Formosa as disclosed by comments of the Court in the District Court.

The Court: I was surprised, too. But when you read the opinion it does not bear that out.

Mr. Hargreaves: No, it does not, your Honor, and apparently it was submitted solely on the question of deportability. The fact is Mr. Grant obtained the copy of the complaint, which he was kind enough to let me read, and there was nothing in there about physical persecution or the Refugee Relief Act. It merely goes on the question of deportability. Of course, it is similar to Cheng and Lin in that they all came to the United States for military training. They left their unit and they remained here illegally.

We are not contesting deportability in the case of Cheng or Lin. That has at all times been conceded. The question which we attempted to bring before the Court was whether or not they were eligible for adjustment under Section [4] 6, and we do not feel that the question of deportability is relevant to Section 6, because we merely needed to show that they were lawfully admitted.

In running our cases in the office last night briefly, we had 47 cases granted by the Immigration Service, and out of those 47 I can only find four cases that were not deportable at the time the application was filed. All the rest of them were in deportable status.

I feel that this question of deportability is the whole crux of our objection to the proposed findings.

The Court: As I indicated earlier in response to Mr. Grant's statements, I intended that my order embrace the issue of relief under the Refugee Act. In my judgment they are not entitled to it, and I

held that the action taken by the Immigration people—I have great sympathy for these two boys; I can appreciate their position. I have sympathy for any alien who comes to this country because of oppression, because of restrictions on religion, because of oppression. People who come here come for a variety of other good and valid reasons. But I cannot escape the feeling, Mr. Hargreaves, that these people—I can't have sympathy for them in this respect, really taking advantage of this government. I do not know what their motives were when they first came here. I assume they have been screened in Formosa before being sent over here, and they were loyal adherents of the [5] Nationalist Government. But after coming here they surreptitiously avoided the normal channels for admission into this country, and then to expect this government to give them sanctuary is, to me, a rather incredible thing. I have no doubt that when they got here, after spending some time on the Island of Formosa, they preferred this government to that to which they had given their allegiance, but, after all, they did give their allegiance to it.

They came here under a plan of exchange, the ramifications of which I am not familiar with, whereby they came here as officials of the Chinese Nationalist Air Force to receive training in Florida, and then they decided they did not like Formosa any more, and so they jumped their ship, whatever they did here, and came here to work as bus boys. That, to me, is not the proper way of doing things. I just can't see it.

Mr. Hargreaves: As to the facts, your Honor, I believe it should be brought out in the case of Cheng, he attempted to resign his commission before he ever came to the United States. He also attempted to enlist in the United States Air Force before he came over here. After he came to the United States he attempted to resign because of his political opposition to Chiang. It was well known in the Air Force, his position, and when it came to the day he was leaving—we can hardly call it a desertion, because his commanding officers realized what awaited him in Formosa, and he had [6] the rest of the officers go into the barracks—he even called the taxi so Cheng could go up town, and helped him pack his baggage.

The Court: What did they do with him when he got back to Formosa.

Mr. Hargreaves: We don't know. Probably the government in Formosa never found out about it.

But they are very sincere in their opposition to the government, and it is not a question of coming over here and just trying to stay in the United States.

Congress has already taken cognizance in the General's case, who did likewise.

The Court: I am familiar with that; he was the one who came here for treatment, hospitalization.

Mr. Hargreaves: Yes. They approved his refugee petition and made him a permanent resident.

I might say, your Honor, Congress reviews these very carefully. In the 47 cases which we had, 12 of those were denied by Congress, and that is the rea-

son I feel that the language in the statute is so mandatory that they be sent to Congress, because Congress reviews them themselves. They have a regular committee set up that just does that, goes over the facts and decides whether these people are entitled to it.

As far as the statutory requirements go, they appear so clear that these people fit within the statute. I don't [7] know, I just feel that these cases should be sent to Congress and let Congress decide them.

The Court: What is the procedure for doing that?

Mr. Hargreaves: If the matter is referred back to Immigration with instructions, then it would go to the regional office and be sent to Congress for consideration.

The Court: What is your position on that, Mr. Grant?

Mr. Grant: I can only follow the instructions which have been set down and the regulations which have been provided under this section. And while Congress has set up this procedure whereby these people can be referred to Congress, they have set up the preliminary procedure that the Immigration Service must first find that they are eligible within the standards that Congress has set up in the Act, and we believe in this case——

The Court: Of course, Immigration has not found that.

Mr. Hargreaves: That is right. This last time they said that because they were connected with the

Air Force, then they have a quasi-official capacity, and residence is in Formosa; since the last residence was Formosa, then they would not come within the Act, though in their prior opinion they held that the last actual residence, as in general terms used, is in China, and they would come within the Act. So we have a [8] very narrow legal question as to the term of residence, and that is the only thing——

The Court: At least one of the wives of one of these petitioners is in Formosa, is she not?

Mr. Hargreaves: Yes, she is there also as a refugee. She has registered with the government as a refugee. She has registered with the American Consul as a refugee. She was taken out of Northern China ahead of the Communists and flown into Formosa.

The Court: What do you regard as their place of residence? Northern China?

Mr. Hargreaves: Northern China, your Honor. That is their own home. Formosa, as far as the wife is concerned, was merely a temporary sanctuary. She was flown out ahead of the Army. The two boys, themselves, were brought in under military orders from Northern China.

Judge Goodman, in his prior opinion, indicated that Congress—or he stated that Congress had reserved this unto themselves to decide these questions.

The Court: But only, as I understand it, after Immigration had decided that they came within the category.

Mr. Grant: Only if they meet the statutory re-

quirements. There is no discretion in immigration. This is not a discretionary statute.

The Court: I appreciate that, but here we are [9] faced with the situation all down the line where every relief sought by these petitioners has been denied, and it is up to me to find some loophole in that, and I have been unable to do it.

Mr. Hargreaves: In each case, on appeal, the matter has been reversed, and reversed, and reversed, until we come down to this last. The only thing that is stopping these cases from going to Congress now is the distinction between official residence and actual residence.

In your Honor's decision in the Sun case you brought out that this was a remedial statute and it should be construed liberally in favor of the alien.

The Court: Yes, I remember that.

Mr. Hargreaves: Certainly in placing such a restricted definition on the term "residence," which is not done in any other refugee case,—they are very liberal in residence on all other cases—but in these particular cases they have used this strict official term in trying to keep it from going to Congress. And I do not feel that these boys have had what you would call an unbiased or fair hearing from Immigration, because from the very start it has just been a battle to keep the case out of Congress.

Mr. Grant: I do not see how you can say that, Mr. Hargreaves. The evidence which was submitted is so voluminous, and in each case it seems to have received adequate [10] consideration.

The Court: It certainly is voluminous. In one

case much of it was irrelevant—newspaper articles, excerpts from Life Magazine, and things like that. But there was a great deal of evidence there.

I am very sympathetic, as I said before I would be, to these people, and I wish there were some way I could help them, if you could point out a way that I could get this to Congress. I am faced with a review of these proceedings before Immigration, and I cannot conscientiously say that there is any deprivation of any rights, or any arbitrary action on the part of Immigration. Faced with that I have to conclude as I have.

Mr. Hargreaves: I feel, your Honor, that this question of residence was actually decided by Judge Goodman. It was in the pleadings. It was answered. It was admitted there before the Court. I do not see how the government could turn around and reverse their findings on that issue. I feel it is *res judicata*, because the matter was pleaded before Judge Goodman.

The Court: Of course, it comes before me *de novo*, does it not?

Mr. Hargreaves: Yes, your Honor. It would not be *de novo*, your Honor, if they are bound by the prior court decision.

Mr. Grant: As I understand it, the effect of [11] Judge Goodman's order was to grant reconsideration, and thereafter there was the reconsideration.

The Court: That was my understanding. Judge Goodman—I don't recall the exact words he used in his opinion, although I have read it several times—

although he did discuss residence at some length, I regarded what he said with regard to residence as mere dicta, in view of the fact that he sent it back to Immigration for reconsideration.

Mr. Hargreaves: We still have the proposition, your Honor, that it was pleaded and conceded.

The Court: Regardless of that, he did not pass definitively upon that. He sent it back to Immigration for reconsideration, did he not?

Mr. Hargreaves: He sent it back—well, we have a very peculiar situation. Immigration denied it on the ground Congress did not intend for this type of person to apply for relief, and Judge Goodman said only Congress can say that, and, of course, Congress, since, by granting the General's case, has shown that they are not excluding persons who were in the Chinese military. And Judge Goodman sent it back and said they could not deny it on that ground.

Actually, it would be the quickest way, also. If this had gone to Congress a couple or three years ago this would have been all decided. But it has been a matter of constant legal technicalities. It is not the type of case where the [12] government has said, "Well, we will make a fair determination and send it up on the facts." But they have been searching and trying to find technicalities on which to deny it.

Mr. Grant: I think that is a conclusion.

The Court: Let me ask you this: To your knowledge have there been any other cases involving these trainees who have come to this country which might be akin to these cases?

Mr. Grant: The only one I know of, your Honor, is the Wei case, and I don't know what happened in the refugee proceeding.

The Court: There is another thing. I have been in a field, now, where I do not belong. I concede that. But presumably we have good diplomatic relations with the Chinese Nationalist Government.

Mr. Grant: That is true, your Honor.

The Court: That is evidenced by the fact that these boys were here initially. And anyone who wants may read and know that we have given considerable aid to Chiang Kai Shek on Formosa.

I would imagine—now, again, as I say, I am in a field in which I hesitate to enter, but Congress might be seriously embarrassed with a situation of this kind.

Mr. Hargreaves: If Congress is embarrassed by the situation, all they have to do is to do nothing, and then the [13] case is denied. If it sits through Congress and no affirmative action is taken, then it is automatically denied. So Congress should not be embarrassed.

The Court: I do not know whether it should be or not. I am just posing that question.

Mr. Hargreaves: Yes. I mean, it is not a case where it is going to come from Congress on argument, because if Congress approves—that is, if it goes through the committee and it is approved, it is put on a master list of names and granted by concurrent resolution. If Congress does not approve, or if the congressional committees do not approve of it, then it is simply left off the list, and at the end

of the congressional term it is automatically back in deportation status and they are faced with expulsion.

The Court: It just dies, in other words.

Mr. Hargreaves: That is right, your Honor.

The Court: Of course, you have your normal channels of appeal from this order.

Mr. Hargreaves: No, there is no appeal, your Honor. I mean, we have exhausted every administrative appeal.

The Court: Do you mean to say you can't go to the Circuit Court?

Mr. Hargreaves: Oh, yes, your Honor; I thought you meant administratively.

The Court: No, I mean an appeal from this order [14] and this judgment. You can go to the Circuit Court.

Mr. Hargreaves: Certainly, your Honor.

The Court: As much as I dislike to do it, because I do not think I could be more plain in indicating my sympathy to your cause, I am afraid you will have to go to the Circuit Court. This is one time I hope I may be reversed.

Mr. Hargreaves: Incidentally, your Honor, on this are you making a finding that they would not be subjected to physical persecution in Formosa?

The Court: No, I am not making any finding on that at all. I would be ruling in a vacuum if I did that. I have no means of knowing. We have some letters, which are not very persuasive, from the Chinese Consul, that they would be given a fair trial and possibly a three-year sentence.

Mr. Hargreaves: We are faced with one more problem, then, your Honor. If your Honor is not prepared to rule on that issue—of course, he does not need to establish actual persecution, but only fear of persecution, under the statute—I think there is no question about it; he certainly has fear of prosecution——

The Court: He has a reasonable fear of being prosecuted for desertion, even though it may be a technical desertion. He has to face trial.

Mr. Hargreaves: That is not the fear which he has. I mean because of the political—— [15]

The Court: What you mean to say is that he has a reasonable fear that he is going to be persecuted because of his political antipathy toward Chiang Kai Shek.

Mr. Hargreaves: That is correct, your Honor, and because of his actual actions against him. And, of course, if you uphold the government's finding that his last official residence was Formosa, then there is still the question, well, if he has established a reasonable fear of return to Formosa, he is still eligible for relief under the Refugee Relief Act.

Mr. Grant: Your Honor, I hope I did not mislead you. There is a conclusion in here that the petitioner is not eligible for consideration under Section 6, since he can return to his place of residence, Taiwan, Formosa, without fear of persecution on account of race——

The Court: Oh, yes, that is in there. I remember that. All I have that is tangible to go on is the letter of the Chinese Consul.

Mr. Hargreaves: In opposition to that there is, of course, not only the man's own testimony, but there is Wu, a former governor, and there is the former testimony of two former Army officers. There is a great deal of direct evidence in there as to the conditions that existed in Formosa, and it would not be a prosecution for the crime of desertion, but punishment or death because of his political opposition.

The Court: If I were to hold that he has a [16] reasonable fear of persecution because of his political beliefs, then I would have to hold that he is eligible for relief under the Refugee Act, and I cannot hold that. I simply cannot, in logic, in reason, hold that, in view of the evidence taken administratively which has been before me.

Mr. Hargreaves: If he has a reasonable fear, then he is eligible. At least it should be sent to Congress and let Congress decide it.

Mr. Grant: There must be a distinction between whether he has a fear and whether his fear is objectively valid. He may have that fear, but we have no concrete evidence.

The Court: As a man I can appreciate his apprehension about going back there, but, as Mr. Grant has pointed out, objectively I have no evidence upon which to predicate that. That is a complete answer. In fact, there is some evidence to the contrary. Frankly, as a man, I would not believe it.

Well, there is nothing I can do but sign the judgment that is submitted, and the findings.

And I hope, Mr. Hargreaves,—and I do sincerely

hope — you may be able to get some relief in the Court of Appeals.

Mr. Hargreaves: It will be taken up, your Honor.

The Court: All right. I hope so. [17]

Mr. Hargreaves: Thank you.

I assume, your Honor, that the Immigration Service will stay deportation pending the appeal, but if it becomes necessary, will your Honor consider a temporary restraining order until we have had an opportunity to get this record before the Circuit Court?

The Court: Certainly.

Mr. Grant, will you advise Immigration that I want to stay deportation until that time?

Mr. Grant: I feel sure they will, your Honor.

The Court: So it will not be necessary, Mr. Hargreaves, to get such an order at this time. If it becomes necessary, I might sign it.

Mr. Grant: I don't feel it will be necessary.

The Court: The court will be in recess.

[Endorsed]: Filed March 4, 1958.

[Endorsed]: Nos. 15959, 15960. United States Court of Appeals for the Ninth Circuit. Cheng Fu Sheng and Lin Fu Mei, Appellants, vs. Bruce G. Barber, District Director, Immigration and Naturalization Service, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: March 24, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

